

Third Division
September 30, 2013

No. 1-12-3453

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(3)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SHAHIDA KHAN,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	
)	12 M1 300426
ISABEL SOLANO, ZIPCAR, INC., and UNIQUE)	
INSURANCE COMPANY,)	Honorable
)	James E. Snyder,
Defendants-Appellees.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held:* (1) plaintiff's request for an extension of time to file a second amended complaint should not have been denied and her complaint against the alleged tortfeasor dismissed with prejudice when the complaint states the gist of a cause of action for negligence; (2) a complaint is insufficient to plead a breach of contract action where the plaintiff fails to recite the terms of the contract in the complaint or attach a copy of the contract to the complaint; and (3) a plaintiff is prohibited from recovering personal injury damages against an insurer prior to obtaining a judgment against the insured.

¶ 2 Plaintiff, Shahida Khan, filed a complaint against the defendants, Isabel Solano (Solano),

Zipcar Incorporated (Zipcar) and Unique Insurance Company (Unique), for damages resulting from a motor vehicle accident involving Khan and Solano. The trial court granted the defendants' motions to dismiss Khan's amended complaint, but granted Khan leave to file a second amended complaint. When Khan failed to file the second amended complaint within the time allowed by the court, the court dismissed the case with prejudice.

¶ 3 On appeal, Khan argues that the trial court erred by (1) dismissing Unique with prejudice pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)), (2) granting Solano's and Zipcar's section 2-615 motions to dismiss, (3) closing discovery without prior notice, and (4) denying her motion for an extension to file a second amended complaint. Khan also argues that the amended complaint should be transferred to the law division. We find that the amended complaint alleged the gist of a cause of action for negligence against Solano, but it alleged insufficient facts to state a breach of contract action against Zipcar. We also find that the trial court did not err when it dismissed Unique, the insurance company, pursuant to section 2-619 of the Code. Therefore, we affirm in part, reverse in part and remand.

¶ 4 Background

¶ 5 On August 6, 2011, Khan was driving a car owned by Zipcar when the car was rear-ended by a vehicle driven by Solano. Khan reported the accident to Zipcar which temporarily suspended her account while it investigated the cause of the accident. Zipcar's vehicle sustained damages in the amount of \$1,865.86 and Zipcar submitted the claim to Unique, Solano's automobile insurance carrier. At first, Zipcar stated in an email to Khan that

Unique denied the claim because Khan had made an unsafe lane change causing the accident. Khan denied Unique's statement that she changed lanes at the time of the accident. In a later email, Zipcar stated that Unique denied the claim because Solano's car was rear-ended by another vehicle and pushed into Khan's car. Zipcar informed Khan that because the car that started the chain reaction left the scene, it was unable to pursue the unidentified driver to recover its costs. Consequently, Zipcar billed Khan's account \$750 for the damage to its car and it paid the remaining \$1,115.86 to repair the car.

¶ 6 Khan refused to pay the \$750 and her Zipcar account remained suspended. On February 16, 2012, Khan filed a *pro se* complaint naming Solano, Zipcar and Unique as defendants and prayed for \$5,000 in damages.

¶ 7 On March 27, 2012, Solano and Unique filed a motion to dismiss Khan's complaint for failure to state a cause of action pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2010). Unique also filed a separate motion to dismiss and argued that Illinois law prohibits direct third party actions against insurance companies.

¶ 8 On April 11, 2012, the trial court entered an order that granted Solano's section 2-615 motion to dismiss, the order also dismissed Unique, and it gave Khan 28 days to file an amended complaint.

¶ 9 Solano

¶ 10 Khan filed her amended complaint on August 27, 2012, and alleged that at the time of the accident, she had stopped at a red light when Solano ran into the back of her car. The amended complaint also alleged that the accident occurred because Solano observed that the

traffic light was on yellow or red, that she assumed that by the time she got closer to the light, it would change to green, that Solano did not reduce the speed of her vehicle, that when Solano got close to Khan's car, the traffic light was red and it was too late for Solano to stop her vehicle and she struck Khan's car. Khan further alleged that Solano prolonged the impact by having her foot on the accelerator, instead of on the break. Finally, Khan alleged that Solano was negligent in causing the accident and that Solano was liable for all her injuries.

¶ 11 Khan alleged that her damages include physical injuries, property damage, emotional trauma and loss of earnings. According to Khan, the exact amount of damages will be determined once her treatment is complete, but she estimated that she had \$30,000 in existing bills and damages and \$2,500 in future damages.

¶ 12 Zipcar

¶ 13 Khan alleged in her amended complaint that Zipcar (1) did not fulfill its responsibilities as an insurance company; (2) failed to utilize prompt claims investigation and settlement standards; (3) failed to determine liability in a timely manner; (4) wrongfully deprived her of the use of a car by closing her Zipcar account; (5) misrepresented to Khan that it did not provide personal injury protection; and (6) failed to provide her with the service that it normally provides to other customers. Khan prayed for \$17,000 in damages against Zipcar, plus \$2,500 credit towards her Zipcar account.

¶ 14 Unique

¶ 15 Khan alleged that Unique wrongfully denied her coverage when there was no question as to Solano's liability. Khan also alleged that Unique acted wrongfully by refusing to pay the

claim without conducting a reasonable investigation, and that Unique was guilty of common law fraud because it tried to mislead her into believing that she could only recover if she found the hit-and-run driver. Khan prayed for \$45,000 in damages against Unique.

¶ 16 The Trial Court's Orders

¶ 17 On September 10, 2012, the trial court closed discovery and assigned the case to mandatory arbitration. On that same day, Khan filed exhibits in support of her amended complaint, which included her medical bills and documents from Zipcar's website containing general information on Zipcar's policies and membership.

¶ 18 On September 13, 2012, Zipcar filed a motion to dismiss Khan's amended complaint. The trial court's September 24, 2012, order states that Solano filed a section 2-615 motion to dismiss, but the record does not contain a copy of the motion. The September 24, 2012, order (1) dismissed Unique with prejudice pursuant to section 2-619 of the Code, (2) granted Solano's and Zipcar's section 2-615 motions to dismiss, and (3) gave Khan until October 15, 2012, to file a second amended complaint against Solano and Zipcar.

¶ 19 On October 15, 2012, Khan filed a motion for an extension through October 29, 2012, to file a second amended complaint. Then, on October 24, 2012, Khan filed a motion to set aside the court's September 24, 2012, order dismissing Unique with prejudice.

¶ 20 On October 25, 2012, the trial court denied Khan's motion for an extension of time to file a second amended complaint, denied the motion to reconsider the order dismissing Unique with prejudice, and dismissed the case with prejudice.

¶ 21 Analysis

¶ 22 Record On Appeal

¶ 23 Before we address the issues raised by Khan, we will discuss defendants' argument that Khan failed to provide this court with a complete record to consider the merits of this appeal. Specifically, defendants argue that Khan failed to include a report of proceedings, a bystander's report or an agreed statement of facts. The appellant has the burden to present a sufficiently complete record of the proceedings at the trial level to support a claim of error by that court. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). However, the appellant's failure to file a report of proceedings is not fatal where the merits of the appeal may be judged on the pleadings. *Walker v. Iowa Marine Repair Corp.*, 132 Ill. App. 3d 621, 625-26 (1985). Here, because the trial court based its decision on pleadings and supporting documents and no evidentiary hearing was held, and this court is basing its decision on the same documents reviewed by the trial judge, we find that Khan's failure to include a report of proceedings in the record does not prevent us from considering the issues raised in this appeal. See *Midwest Builder Distributing, Inc. v. Lord & Essex, Inc.*, 383 Ill. App. 3d 645, 655 (2007).

¶ 24 Standard of Review

¶ 25 Khan argues that the trial court erred when it entered an order dismissing Unique with prejudice pursuant to section 2-619 of the Code and when it granted Solano's and Zipcar's section 2-615 motions to dismiss. A motion to dismiss under section 2-619 admits the legal sufficiency of the complaint, but asserts an affirmative defense or other matter that defeats

the plaintiff's claim. *Czarowski v. Lata*, 227 Ill. 2d 364, 369 (2008). A cause of action should not be dismissed under section 2-615, unless it is clearly apparent that the plaintiff can prove no set of facts which would entitle him or her to recover. *McFatridge v. Madigan*, 2013 IL 113676, ¶ 16. The Code provides that pleadings shall be liberally construed with a view to doing substantial justice between the parties. 735 ILCS 5/2-603(c) (West 2010). The Code specifically recognizes that no complaint is bad in substance that reasonably informs the defendant of the nature of the claim that he or she is called on to meet. *Chandler v. Illinois Central R.R. Co.*, 207 Ill. 2d 331, 348 (2003) (citing 735 ILCS 5/2-612(b) (West 2000)). On appeal from a section 2-619 motion, the reviewing court must consider whether the existence of a genuine issue of material fact should have precluded the dismissal or whether dismissal is proper as a matter of law (*Czarowski*, 227 Ill. 2d at 369), and on appeal from a section 2-615 motion, the question is whether the allegations in the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *Karas v. Strevell*, 227 Ill. 2d 440, 451 (2008). Appellate courts review orders granting section 2-619 motions to dismiss and section 2-615 motions *de novo*. *Czarowski*, 227 Ill. 2d at 369; *Karas*, 227 Ill. 2d at 451.

¶ 26 Counts Against Solano

¶ 27 In the amended complaint, Kahn alleged that Solano was negligent and caused her damages. Section 2-603 of the Code of Civil Procedure, requires that all pleadings contain a "plain and concise statement of the pleader's cause of action", "divided into paragraphs numbered consecutively, each paragraph containing, as nearly as may be, a separate allegation." 735

ILCS 5/2-603 (West 2010). Khan's single-spaced, 14-page pleading violates the foregoing provisions. The amended complaint contains four labeled "counts" against Solano, none of which states a coherent claim. There are no numbered paragraphs and the prayers for relief include such requests as "the court should not consider the driver who hit, if he did, the defendant," (Count II); "order [Unique] to submit their investigation report," (Count III); and "the court to award a compensation that is more than the policy limits so that it can serve as deterrent and encourage defendant Solano to drive more safely." (Count IV). The amended complaint, in its present form, is indecipherable. Nevertheless, in the pleading we find the "gist" of a cause of action for negligence against Solano, but we will not impose on counsel for Solano or the trial court the burden of ferreting it out.

¶ 28 Khan also argues that the trial court erred when it denied her motion for an extension of time to file a second amended complaint. We believe the dismissal of the amended pleading with prejudice as to Solano was an abuse of discretion given Khan's pending request for a short extension of time to file a second amended complaint. We find that the trial court erred when it dismissed Khan's complaint against Solano with prejudice. Therefore, on remand, Khan should be given the opportunity to conform her pleading against Solano to the requirements of the Code, and failing such compliance, dismissal with prejudice is appropriate.

¶ 29 **Counts Against Zipcar**

¶ 30 Khan alleged that Zipcar (1) did not fulfill its responsibilities as an insurance company; (2) failed to utilize prompt claims investigation and settlement standards; (3) wrongfully deprived her of the use of a car by closing her Zipcar account; (4) failed to determine liability

in a timely manner; (5) misrepresented to Khan that it did not provide personal injury protection; and (6) failed to provide her with the service that it normally provides to other customers.

¶ 31 Based on the allegations in Khan's amended complaint against Zipcar, Khan was complaining about Zipcar's breach of the contract the parties entered into. See *American Family Mutual Insurance Co. v. Roth*, 381 Ill. App. 3d 760, 766 (2008) (holding that the complaint must be read as a whole in order to determine its true nature). To plead a breach of contract action, a plaintiff must allege: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of the contract by the defendant; and (4) resultant injury to the plaintiff. *Gallagher Corp. v. Russ*, 309 Ill. App. 3d 192, 199 (1999). When a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to her complaint an affidavit showing that the instrument is not accessible to her. *Plocar v. Dunkin' Donuts of America, Inc.*, 103 Ill. App. 3d 740, 749 (1981) (citing Ill. Rev. Stat. 1979, ch. 110, par. 36) (now 735 ILCS 5/2-606 (West 2010)).

¶ 32 In this case, Khan did not recite the terms of the contract the parties entered into nor did she attach it to the amended complaint, and she did not attach an affidavit to her amended complaint explaining that the instrument was not accessible to her. We note that Khan's supporting exhibits included documents from Zipcar's website containing general information about Zipcar's policies and membership. However, without a recitation of the

terms of the contract or a copy of the contract that Khan and Zipcar entered into, the amended complaint failed to state a cause of action for breach of contract. Therefore, we find that the trial court did not err when it dismissed Khan's amended complaint against Zipcar.

¶ 33 Counts Against Unique

¶ 34 Khan's amended complaint alleged that Unique wrongfully denied her coverage when there was no question that Solano was liable for her injuries. In *Richardson v. Economy Fire & Casualty Co.*, 109 Ill. 2d 41, 47 (1985), our supreme court held that the public policy of this state prohibits an injured party from recovering personal injury damages against an insurance carrier on account of the negligence of its insured prior to obtaining a judgment against the insured. Here, because Khan has not obtained a judgment against Solano, Unique's insured, *Richardson* prohibits Khan from filing an action to recover personal injury damages against Unique. *Richardson*, 109 Ill. 2d at 47. Accordingly, the trial court did not err when it dismissed Unique pursuant to section 2-619 of the Code.

¶ 35 Trial Court's Order Closing Discovery

¶ 36 Trial courts are afforded great latitude in determining the permissible scope of discovery (*D.C. v. S.A.*, 178 Ill. 2d 551, 561 (1997)), and their rulings on discovery matters are generally reviewed for an abuse of discretion. *Reda v. Advocate Health Care*, 199 Ill. 2d 47, 54 (2002).

¶ 37 Khan argues that the trial court erred when it closed discovery without giving the parties prior notice. Specifically, Khan argues that the trial court's order should be reversed "if the

order *** bars the parties from requesting and/or filing statements/depositions from physicians and other experts," and if it prevents her from propounding requests to admit to the defendants. The defendants respond that because Khan's original complaint sought damages less than \$10,000, it was a small claims action and the rules governing small claims provide that no depositions or interrogatories or other discovery procedure shall be used except by leave of court. Ill. S. Ct. R. 287 (eff. Aug.1, 1992).

¶ 38 Supreme Court Rule 281 defines a small claim as a civil action based on either tort or contract for money not in excess of \$10,000. Ill. S. Ct. R. 281 (eff. Jan. 1, 2006). Here, Khan's amended complaint is the subject of this appeal and it sought damages in excess of \$10,000. Therefore, we find that the amended complaint was not subject to the discovery rules governing small claims.

¶ 39 In light of our finding that the amended complaint alleged facts that stated a cause of action for negligence against Solano, this case will proceed against Solano. Therefore, on remand, we direct the trial court to reopen discovery in order to allow Khan and Solano the opportunity to obtain information to establish their claims and defenses. See Ill. S. Ct. R. 218(c) (eff. Oct. 4, 2002) (the discovery rules are intended to promote substantial justice between the parties); *Maxwell v. Hobart Corp.*, 216 Ill. App. 3d 108, 114 (1991).

¶ 40 Transfer to Law Division

¶ 41 Finally, Khan argues that her case should be transferred to the law division. In light of the fact we are remanding this case, we see no reason to address this issue since Khan can file a motion for a transfer when the case is returned to the trial court.

¶ 42

Conclusion

¶ 43 We find (1) that the amended complaint states the gist of a cause of action for negligence against Solano, but it alleged insufficient facts to state a breach of contract action against Zipcar; (2) that the trial court abused its discretion when it denied Khan's motion for an extension of time to file a second amended complaint against Solano; (3) that Khan's direct action against Unique, an insurance company, is prohibited by Illinois law; and (4) that Khan can file a motion for a transfer when the case is returned to the trial court. Accordingly, we reverse the trial court's order that dismissed the amended complaint against Solano, we affirm the orders against Zipcar and Unique, and we remand for further proceedings consistent with this order.

¶ 44 Affirmed in part and reversed in part; cause remanded.